(2)

99-1965

No.

In The

Supreme Court of the United States

October Term, 1999

Supreme Court, U.S.
FILED
JUL 6 2000
CLERK

STAFF SERGEANT KEVIN TOWNES, USMC,
Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF *AMICUS CURIAE*
U.S. ARMY DEFENSE APPELLATE DIVISION
IN SUPPORT OF PETITIONER

JONATHAN F. POTTER
Major,
Judge Advocate General's Corps (JA)
United States Army
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703)588-5291

KEVIN J. MIKOLASHEK
Captain, JA
United States Army

ADELE H. ODEGARD
Colonel, JA
United States Army

38pp

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
CONCLUSION	11
APPENDIX A	1a
APPENDIX B	11a
APPENDIX C	15a

TABLE OF AUTHORITIES

CASES:

United States Supreme Court:

Hunt v. Blackburn, 128 U.S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888) 7

Jenkins v. Anderson, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980) 8

Upjohn v. United States, 449 U.S. 383, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981)..... 7,10

Military Courts:

United States v. Andeozzi, Army Docket No. 9800870..... 2

United States v. Daniels, No. 9500822 (Army Ct. Crim. App.) 2,6,9

United States v. Jeffery, No. 9700955 (Army Ct. Crim. App.) 2,3,6

United States v. McGee, No. 9700480 (Army Ct. Crim. App) 5,6

United States v. McKnight, Army Docket No. 9800871..... 2

United States v. Morgan, No. 9601890 (Army Ct. Crim. App.) 2,3,9

United States v. Nehring, No. 9700342 (Army Ct. Crim. App.) 3,8,9

United States v. Reed, No. 9801750 (Army Ct. Crim. App.)..... 1,9

United States v. Richards, No. 9700809 (Army Ct. Crim. App.)..... 2,9

United States v. Robinson, No. 9700852 (Army Ct. Crim. App.) 2,3,9

United States v. Urbina, No. 9801405 (Army Ct. Crim. App.) 2

STATUTES AND RULES:

10 U.S.C. § 825(c)(1), Uniform Code of Military Justice [UCMJ] Article 25 ..... *passim*

Manual for Courts-Martial [MCM], United States,Military Rule of Evidence 502 (1998). 8

Manual for Courts-Martial [MCM], United States, Military Rule of Evidence 501 (1998). 10

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1999

STAFF SERGEANT KEVIN TOWNES, USMC,
Petitioner,

v.

THE UNITED STATES OF AMERICA, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF *AMICUS CURIAE* U.S. ARMY DEFENSE APPELLATE DIVISION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The U.S. Army Defense Appellate Division files this brief in support of the U.S. Navy-Marine Corps Appellate Review Activity Defense Division's Petition for a Writ of Certiorari.[1]

The U.S. Army Defense Appellate Division represents individual soldiers who have been convicted by court-martial and who have been adjudged either a punitive discharge or confinement for one year or more. Defense Appellate Division counsel represent these individuals at the Army Court of Criminal Appeals

---

[1] Counsel for U.S. Army Defense Appellate Division, Major Jonathan Potter, certifies that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, made a monetary contribution to the preparation or submission of the brief.

(ACCA); the Court of Appeals for the Armed Forces (USCAAF); and the Supreme Court of the United States.

Several soldiers represented by the Army Defense Appellate Division claim on appeal that their court-martial did not have jurisdiction because they never personally selected to be tried by a court-martial composed of enlisted members, as required by Article 25, Uniform Code of Military Justice (UCMJ). Rather than finding jurisdictional defect, appellate courts have ordered fact-finding inquiries to discover what advice the convicted soldier received from his trial defense counsel and what the convicted soldier communicated to his trial defense counsel regarding which forum he desired. Such fact-finding inquiries impermissibly pierce confidential attorney-client communications.

Amicus is concerned that the USCAAF's holding that "substantial compliance" with Article 25 (where a defense counsel elects the forum for an accused) will lead to never-ending occasions where the attorney-client veil must be pierced. Currently, *amicus* has eleven cases pending before the Army Court of Criminal Appeals in which an accused who was tried by a panel of enlisted members did not personally select such a panel in accordance with Article 25.[2] In five of these cases the trial defense counsel was ordered to testify despite

---

[2] *United States v. Daniels*, Army Court of Criminal Appeals (Army) Docket No. 9500822; *United States v. Morgan*, Army Docket No. 9601890; *United States v. Richards*, Army Docket No. 9700809; *United States v. Nehring*, Army Docket No. 9700342; *United States v. McGee*, Army Docket No. 9700480; *United States v. Robinson*, Army Docket No. 9700852; *United States v. Jeffery*, Army Docket No. 9700955; *United States v. Andeozzi*, Army Docket No. 9800870; *United States v. McKnight*, Army Docket No. 9800871; *United States v. Urbina*, Army Docket No. 9801405; *United States v. Reed*, Army Docket No. 9801750.

invoking the attorney-client privilege.[3] Evidentiary hearings have not yet been ordered in three of these cases; it is likely that trial defense attorneys will invoke the privilege in these cases as well.

SUMMARY OF ARGUMENT

Article 25, UCMJ's bright line requirement that a military judge elicit an accused's personal selection of a court-martial panel consisting of enlisted members ensures that an accused has indeed decided to be tried by such a forum. Influences unique to military service, specifically the deference to superiors and unflinching obedience to orders, require this protective measure. *Amicus* cites one client who perceived a court-martial convening order (which included a panel of enlisted members) as an order from a general officer which made clear the general's decision that the accused would be tried by a panel of enlisted members, a decision from a superior officer which precluded the accused from making that decision. The accused listened obediently as the military judge and defense counsel discussed the forum options. He never personally selected the forum, as Congress intended. This case perfectly demonstrates the importance of complying strictly with Article 25, UCMJ.

In addition, allowing trial defense counsel to elect forum for an accused is inconsistent with Congressional intent and inherently leads to questions regarding whether the accused intended to be tried by that forum. When an accused later claims that the forum that heard his case was not the forum he desired, courts inherently turn to conversations between accused and trial defense counsel to determine whether the accused actually

---

[3] *Nehring, Robinson, McGee, Jeffery* and *Morgan, supra.*

informed the trial defense counsel of his forum request. Such intrusions are not permitted. In enacting Article 25(c)(1), Uniform Code of Military Justice [UCMJ] 10 U.S.C. § 825(c)(1))(1994), Congress established a method that would prevent such intrusions: they required that an accused who is tried by enlisted members must have personally, either orally or in writing, selected that forum. Abiding by such a simple requirement easily prevents subsequent interference with confidential communications between attorney and client.

The privilege allows a client to prevent an attorney from disclosing confidential communications made between attorney and client. Although there are circumstances in which the privilege is either waived or does not apply, no such circumstances exist here. *Amicus* currently represents several clients whose trial defense attorneys were ordered to testify to the substance of confidential communications as a result of the failure to require an accused to personally select forum.

ARGUMENT

I. FAILURE TO ENFORCE THE REQUIREMENT THAT AN ACCUSED TRIED BY A PANEL OF ENLISTED MEMBERS MUST PERSONALLY SELECT SUCH A FORUM HAS DENIED SERVICEMEMBERS THE RIGHT TO BE TRIED BY A FORUM OF THEIR OWN SELECTION.

In enacting Article 25, UCMJ, Congress manifested a clear and unambiguous intent that an accused must personally select trial by enlisted members before that accused is tried by such a forum. *Amicus* currently represents soldiers who, because of circumstances unique to the military, were denied the right not to be tried by an

enlisted panel through the trial judge's failure to obtain the accused's personal forum selection decision.

A classic example of the failure of "substantial compliance" to protect a military accused's right to select enlisted members lies in *United States v. McGee*, No. 9700480 (Army Ct. Crim. App., unpublished opinion ordering evidentiary hearing, 14 July 1999)(Appendix A). In *McGee*, the Army Court of Criminal Appeals found that the record contained no evidence of an "on the record" request by the accused. *(McGee* at 2). In a post-trial affidavit, Sergeant First Class (SFC) McGee stated that although his counsel advised him of the various forum selection options, neither his defense counsel nor the military judge explained to him how forum selection would be effectuated. (Post-trial affidavit of Sergeant First Class McGee, 24 May 1999)(Appendix B). However, when SFC McGee was advised of his forum rights the day of trial, he believed that the convening authority, an Army Major General, had already decided how he would be tried and had made that decision known in the court-martial convening order. *Id.* SFC McGee stated that he "never questioned General Ernst's authority to issue the order" and that he "could not ... comprehend how any actions on [his] part could invalidate a General's orders." *Id.*

SFC McGee was a member of the elite Ranger regiment, a unit whose soldiers pride themselves on discipline and unflinching obedience to orders from the officers appointed to lead them.[4] When shown an

---

[4] All those selected to be part of the Ranger regiment undergo extensive selection and training and abide by the "Ranger Creed," which provides, in pertinent part: "Gallantly will I show the world that I am a specially selected and well-trained soldier. My courtesy to superior officers ... shall set the example for others to follow." U.S. Army Student Handbook (SH) 21-76 (1992).

"order" from a general, SFC McGee believed that the General had decided that a panel consisting of enlisted members would hear the case. An attorney trained in military law knows that a court-martial convening order does not determine whether an accused will face trial by judge alone, or a panel consisting of officer or enlisted members. However, SFC McGee was trained not in military law, but in the fundamentals of tactics, discipline and obedience to orders. He understood the order as a decision regarding which officers and enlisted soldiers would hear his case. He did not question the order. He listened obediently as his defense counsel and the military judge discussed which forum would try him. *McGee, supra* at 5.

This scenario illustrates the dangers inherent in the USCAAF's failure to follow Congress' specific mandate that a military accused personally select enlisted members before being tried by such a forum. The reflexive obedience to orders and great deference to superiors that are absolutely essential to combat-readiness in the military may also prejudice a military accused unless measures are taken to prevent these qualities from encroaching on an accused's right to select forum. The bright line rule established by Congress in Article 25, UCMJ is such a preventive measure. However, USCAAF's failure to enforce the statute renders the statute ineffective to protect a military accused from the influences inherent in the military's hierarchical culture where obedience to orders and deference to superiors are indelibly ingrained into servicemembers.

Congress' intent was to require a military judge to elicit a military accused's personal election of an enlisted panel before that accused is tried by enlisted members.

This requirement protects the military accused from the dangers discussed above and ensures that the selection of forum is the personal selection of the accused.

II. FAILURE TO ENFORCE THE REQUIREMENT THAT AN ACCUSED TRIED BY A PANEL OF ENLISTED MEMBERS MUST PERSONALLY SELECT SUCH A FORUM HAS LED TO IMPERMISSIBLE INTRUSIONS INTO ATTORNEY-CLIENT COMMUNICATIONS.

a. The attorney-client privilege.

The Supreme Court has recognized the attorney-client privilege as "the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States*, 449 U.S. 383, 389, 66 L. Ed. 2d 584, 101 S. Ct. 677 (1981). The rationale for its existence was articulated long ago by the Supreme Court:

> [The privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470, 9 S. Ct. 125, 32 L. Ed. 488 (1888)(quoted in *Upjohn*, 449 U.S. at 389).

In the military, the attorney-client privilege exists pursuant to the Manual for Courts-Martial [M.C.M.], United States, Military Rules of Evidence (1998). Mil. R. Evid. 502 provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing

> confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, ...between the client ... and the lawyer ... (Mil. R. Evid. 502).

Advice concerning the forum choices that an accused has the right to make encompasses not only a recitation of the Manual for Courts-Martial, but necessarily includes which forum is most advantageous to a particular accused.

b. Failure to enforce Article 25 has led to unnecessary breaches of the attorney-client privilege.

When the Army Court of Criminal Appeals is faced with an accused who was tried by a court-martial panel which consisted of enlisted members and the accused did not personally select this forum, appellate courts have ordered limited evidentiary hearings to determine the accused's intent. Since a court cannot compel an accused to speak, *see Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980), courts turn to the accused's trial defense attorney. *Amicus* currently represents several clients whose trial defense attorneys have been ordered to testify in limited evidentiary hearings regarding the discussions they had with their respective clients concerning forum selection. *United States v. Nehring*, No. 9700342 (Army Ct. Crim. App., 26 March 1999)(unpublished order requiring evidentiary hearing)(Appendix C), is such a case. In *Nehring*, the Army Court of Criminal Appeals ordered an evidentiary hearing to resolve, *inter alia*, whether the appellant's counsel advised appellant of his forum selection choices. During the hearing, the appellant (through counsel) objected to his trial defense attorney

testifying to any of the questions posed by the Army Court of Criminal Appeals. The appellant's counsel during the evidentiary hearing stated:

> [E]ach and every one of the questions that the appellate court wants you to try to answer, if [the appellant's trial defense counsel] were to testify specifically to those questions, it would violate the privilege because none of the communications between [counsel] and Private Nehring were ever intended to be disclosed at — to anyone ... [t]he right to make the election is right up until that moment in time that he makes the election. Everything else is purely ... advice and discussions leading to that, which are protected by the privilege.

(5 May 1999, Record of Evidentiary Hearing at 18, Nehring, Army Ct. Crim. App. No. 9700342.)

Limited evidentiary hearings conducted to ascertain the substance of communications between attorney and client are commonly ordered by the Army Court of Criminal Appeals. Including *Nehring, amicus* currently represents eight clients whose claims of jurisdictional error based upon the absence of a personal election of enlisted members resulted in such a hearing. *See United States v. Daniels*, No. 9500822 (Army Ct. Crim. App.); *United States v. Morgan*, No. 9601890 (Army Ct. Crim. App.); *United States v. McGee*, No. 9700480; *United States v. Richards*, No. 9700809 (Army Ct. Crim. App.); *United States v. Robinson*, No. 9700852 (Army Ct. Crim. App.); *United States v. Jeffery*, No. 9700955 (Army Ct. Crim. App.); *United States v. Reed*, No. 9801750 (Army Ct. Crim. App.). As long as the USCAAF refuses to enforce the plain-language requirement of Article 25 that an enlisted

panel be personally selected, ambiguity and inevitably more intrusions into attorney-client communications will result.

c. *Limited and clearly-defined circumstances in which the privilege does not apply do not exist here.*

The attorney-client privilege clearly applies to the communications that are the subject of these hearings. Further, the attorney-client privilege has not been waived with respect to any of these communications. In order for a communication to be protected by the privilege, it must be confidential. Mil. R. Evid. 502(a). A communication is deemed confidential

> if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Mil. R. Evid. 501(b)(4).

Communications made to an accused's attorney regarding forum selection are confidential. The attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *United States v. Upjohn*, 499 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981). In this regard, the privilege not only protects an attorney's advice regarding forum selection, but whatever information, concerns and desires a client has regarding this important choice.

Further, there is no evidence that the clients in these cases intended for their attorney to disclose their forum selection choices to any third party. Indeed, Article 25, UCMJ provides that the decision is to be

made by the accused personally, and not through his attorney. We presume the understanding between attorney and client is that, although the client may communicate to his attorney his intention to select a panel of enlisted members, it is the *client*, not the attorney, who will ultimately communicate that to the court. Second, even if an accused informs his attorney that he intends to select a particular forum, that accused may change his mind up until the time that he is called upon by the judge to select forum. All communications leading up to that point are made in furtherance of the attorney rendering legal services, are not intended to be communicated to a third party, and are protected by the privilege.

Violations of the attorney-client privilege are easily prevented by enforcing the clear and unambiguous provisions of Article 25, UCMJ, which requires an accused to personally make forum selection. The Court should grant the Petition for Certiorari and should strike down the USCAAF's failure to enforce the statute.

CONCLUSION

The Court should see the importance of Article 25, UCMJ as preserving an accused's forum selection rights against influences inherent in military service. In addition, as long as appellate courts decline to enforce the strict, bright-line requirement of Article 25, UCMJ, that an accused personally select a panel of enlisted members, appellate courts will continue a barrage on the privileged communications between attorney and client. The Court should consider the impermissible intrusions into privileged communications a secondary,

but important, effect of the USCAAF's disregard of Congress' mandate in Article 25, UCMJ. The Court should therefore grant the Petition for Certiorari.

Respectfully submitted,

JONATHAN F. POTTER
Major,
Judge Advocate General's
Corps (JA)
United States Army
Defense Appellate Division
901 N. Stuart Street
Arlington, VA 22203
(703) 588-5291

KEVIN J. MIKOLASHEK
Captain, JA
United States Army

ADELE H.ODEGARD
Colonel, JA
United States Army

APPENDIX A

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

SQUIRES, ECKER AND MERCK

Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant First Class LOWELL L. McGEE

United States Army, Appellant

ARMY 9700489

United States Army Infantry Center and Fort Benning

L.R. Dean, Military Judge

For Appellant: Colonel John T. Phelps II, JA; Colonel Adele H. Odegard, JA; Major Leslie A. Nepper, JA; Captain Paul J. Perrone, Jr., JA (on briefs); Captain Patricia A. Lewis, JA. For Appellee: Colonel Russell S. Estey, JA; Lieutenant Colonel Eugene R. Milhizer, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on brief); Colonel Russell S. Estey, JA; Captain Mary E. Braisted, JA; Captain Joseph A. Pixley, JA (on supplemental brief).

14 July 1999

MEMORANDUM OPINION

ECKER, Judge:

Contrary to his pleas, a General Court-Martial composed of officer and enlisted members convicted appellant of attempted premeditated murder, attempted conspiracy to commit murder, attempted conspiracy to solicit the commission of murder, and two solicitations to commit premeditated murder,[1] in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 880 and 934 [hereinafter UCMJ]. His approved sentence included a dishonorable discharge, forfeiture of all pay and allowances, confinement for twenty years and reduction to private E1. Appellant was credited with 201 days toward the sentence to confinement.

In his supplemental assignment of error,[2] appellant claims his court-martial lacked jurisdiction to try him, rendering the findings void. The essence of this claim[3] concerns the record's failure to show, as required by Article 25(c)(1), UCMJ, that appellant personally, on the record, chose trial by a panel composed of at least one-third enlisted members. We agree that the record of trial contains no evidence of an "on the record request"

---

[1] Appellant was originally charged with two conspiracies: to commit murder and solicitation to commit murder. Due to a failure of proof, the military judge reduced those offenses to attempted conspiracies. The specifications were then placed, along with the specification of attempted premeditated murder, under the original attempt charge, the original conspiracy charge, (Charge II) was dismissed, and Charge III was renumbered. The members acquitted appellant of a third solicitation specification.

[2] Appellant's original assignment of error asserted a claim of multiplicious charging. See Rules for Court-Martial 907(b)(3)(B)(and discussion thereto); see also R.C.M. 307(c)(4) discussion.

[3] The claim is phrased in the following terms:

THE ABSENCE IN THE RECORD *OF ANY* REQUEST FOR TRIAL BY OFFICER AND ENLISTED MEMBERS CONSTITUTES JURISDICTIONAL ERROR AND RENDERS THE COURT-MARTIAL PROCEEDINGS IN THIS CASE VOID.

by appellant. We have also considered appellant's unchallenged sworn post-trial affidavit on this matter. This review satisfies us that none of the principles announced in *United States v. Ginn*, 47 M.J. 236, 248 (1997), directly apply such that we could fairly resolve the issue of forum selection on the whole record now before us without a post-trial hearing. "[T]he record of trial, the pleadings, and the affidavit do not demonstrate conclusively that appellant [is or]is not entitled to relief." *See United States v. Hanley*, No. 97-0363/AF (C.A.A.F. February 24, 1999)(citing *Ginn*, 47 M.J. 236). Therefore, as our superior court did in Hanley, "we believe that further inquiry concerning this allegation must be undertaken before we can continue our review of this case." *See id.*

Appellant was a highly regarded combat veteran serving in the Ranger Regiment. While some witnesses characterized him as slow, his military records listed his general technical (GT) score as 118, or well above average. Further, in slightly more than ten years of active duty service, appellant had attained the rank of Sergeant First Class.

At appellant's arraignment, the military judge fully and correctly advised him of his three forum options. This advice indicated that he had the right to be tried by a panel of at least five officer members; but, if he requested if, the panel would include at least one-third enlisted members. He was also told that he could request trial before the military judge sitting alone. Appellant stated, in response to the judge's questioning, that he understood his rights concerning forum selection, the three options available to him, and that the election of forum was his choice. However, the actual election, and its announcement on the record,

was deferred on request of appellant's defense counsel.[4]

At the last 39(a) session,[5] held on 17 March, before the trial on the merits started,[6] the following colloquy occurred:

> MJ: I just want to clarify two matters on the record before we formally start at this point. Did the accused formally elect an enlisted panel on the record, Captain Rose? I don't recall that he did.
>
> DC: We indicated that on the record, your honor.

---

4 MJ: Do you understand the differences between trial before members and trial before judge alone?

ACC: Yes, your honor.

MJ: And do you understand *the choices that you have?*

ACC: Yes, your honor.

MJ: By which type of court *do you wish* to be tried?

DC: Your honor, at this time we'll defer election of forum.

MJ: Okay. I'll allow you to do that.

The accused will now be arraigned.
(R. at 6-7)(emphasis supplied.)

5 UCMJ art. 39(a).

6 Subsequent to arraignment, four additional pretrial sessions under Article 38(a), UCMJ, were convened to address motions and preliminary matters. During the third session, held on 5 March, defense counsel sought to resolve a request for witnesses and identify who would be detailed to the court-martial panel so that he could prepare for the voir dire of the panel. After some discussion, the military judge urged trial counsel to expedite the selection of the members and give that information to the defense. The apparent result of this urging was the issuance of Court-Martial Convening Order Number 2, dated II March 1997, which detailed enlisted members to the court-martial panel for the first time in appellant's case. At the next (fourth) Article 39(a) session, held on 13 March, defense counsel discussed with the military judge how his planned voir dire of potential members might bear on the length of the proceedings. Appellant was present at both of these sessions but had no questions or input concerning the matters noted above or his forum rights.

MJ: Okay. I know that that was his desire, but I don't know that we actually covered that on the record.

DC: We did not, your honor.

MJ: Okay —

DC: I believe that we deferred selection of forum in the previous 39(a).

MJ: Okay, and his desire, I take it from looking at the fact that there are enlisted folks sitting — names at least over here on the panel, is that he be tried before an enlisted panel. Is that correct?

DC: Yes, your honor, it is.

MJ: Okay, and the final matter was plea. At one point I allowed the accused to defer. Would the accused formally enter a plea to the charges and specifications?

DC: To all charges and specifications the accused pleads: Not Guilty.

MJ: Okay. Is there anything additional before we call the members in? I believe those are the only matters that we still had that absolutely, positively had to be taken care of before we started the trial.

TC: No, sir, there's nothing additional.

MJ: Okay. This 39(a) Session is terminated. If you would call the members. . .

No other discussion concerning appellant's forum election appears in the record of trial. However, during voir dire, the record indicates that the defense questioned three members individually and that appellant consulted with counsel during the questioning of an officer and an enlisted member. Finally, during the

announcement of challenges, counsel again consulted appellant before challenging an officer member for cause and an enlisted member peremptorily. Both challenges were granted.

In his sworn post-trial affidavit, appellant now recalls being advised concerning the three forum types by both the military judge and detailed defense counsel, but asserts he was never "informed [] how forum selection would be effectuated." He goes on to state that he never discussed a choice of forum with anyone, and after Court-Martial Convening Order Number 2 was provided to the defense, "It was my belief that when General Ernst issued the order, *dictating members that would try me*, the issue was closed," and "I could not, *nor can I*, comprehend how any action on my part could invalidate a General's orders." Appellant's Exhibit XXXIII-O (emphasis supplied). He concludes by stating, "I never requested to be tried by enlisted members" but instead followed the General's order.

Article 25(c)(1), UCMJ, states that enlisted personnel may serve as members of a court-martial panel hearing the case of an enlisted soldier "only if . . . the accused personally has requested orally on the record or in writing that enlisted members serve on it." Further, the article requires that this election be made during a *pretrial* Article 39(a), UCMJ, session or, in the absence of such a proceeding, *before assembly* of the court. Violation of the article's requirements was held to be jurisdictional, requiring the setting aside of any convictions by an enlisted panel not personally selected on the record by an accused. *See United States v. White*, 21 U.S.C.M.A. 583, 45 C.M.R. 357 (1972); *United States v. Brandt*, 20 M.J. 74 (C.M.A. 1985). *But cf. United States v. Mayfield*, 45 M.J. 176 (1996).

Until recently, this court has applied *White* and required strict compliance with the terms of Article 25, UCMJ. *See United States v. Brookings*, 33 M.J. 793 (A.C.M.R. 1991); *United States v. Hood*, 37 M.J. 784 (A.C.M.R. 1993). However, the recent decision of the Court of Appeals for the Armed Forces in *United States v. Turner*, 47 M.J. 348 (1997), casts substantial doubt on the continued vitality of White and its progeny. *Turner*, involved related, and what was previously considered jurisdictional significant, requirements for selecting trial by judge alone under Article 16, UCMJ. The court applied the concept of substantial compliance and sustained an otherwise defective forum selection. Based on *Turner*, this court recently applied the concept of substantial compliance to resolve a technical violation of Article 25, UCMJ. *See United States v. Lanier* — M.J. — (Army Ct. Crim. App. 2 Apr. 1999). *But cf. United States v. Townes*, — M.J. — (N.M. Ct. Crim. App. 28 Apr. 1999).

We note that in finding substantial compliance in the *Turner* case, the court stated, "The record of trial as a whole makes clear that the selection was the accused's choice, and that the error . . . did not materially prejudice the substantial rights of the accused. Art. 59(a)." 47 M.J. at 350. In reaching this conclusion concerning the record "as a whole," the court looked to the prevailing federal treatment of Fed. R. Crim. P. 23 (a), (b) which is "the civilian counterpart of Article 16." This review indicated that, "[w]here the record reflects that the defendant understands his rights" and either "desires" or "consent[s]" to the forum involved, failure to strictly comply with the requirements of the Federal Rules "is regarded as a nonjurisdictional procedural error." *Turner*, 47 M.J. at 350 *(citing United States v. Fisher*, 912 F.2d 728 (4th Cir. 1990)).

While appellant's affidavit addresses pertinent questions bearing on the presence of enlisted members, its silence in other areas is almost deafening. Further, portions appear to conflict with statements by appellant found in the transcript as well as representations of his trial defense counsel. This latter point may also implicate a question of ineffective assistance of counsel. In any event, the record of trial and appellant's affidavit, taken together, place in doubt whether he understood his forum rights and more importantly, whether the forum utilized was due to his choice or one he consented to.

Accordingly, the current record needs further development before we can fully and fairly evaluate the credibility of appellant's affidavit or resolve the issues noted above, and thereby determine whether Article 25, UCMJ, was "substantially complied" with, and if not, whether any prejudice has occurred due to the error. This court has used the *Dubay*[7] proceeding to attempt resolution of such questions. *See, e.g., United States v. Daniels*, ARMY 9700601 (Army Ct. Crim. App. 23 Sept. 1998) (unpub.); *cf. Hanley*, No. 97-0963/AF. Under the circumstances of this case, we elect to use that mechanism for additional fact-finding.

The record of trial shall be returned to The Judge Advocate General for remand to a convening authority. That convening authority will refer the record to a general court-martial for a hearing pursuant to Dubay, 37 C.M.R. at 413. The military judge will determine whether appellant made and communicated a forum selection, and if so, how he communicated such selection. The military judge will hear the respective contentions

---

[7] *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

of the parties on the questions, permit the presentation of witnesses and evidence in support thereof, make rulings as appropriate and within fourteen days of the hearing, enter findings of fact and conclusions of law thereon. At the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, shall be returned to this court for further review.

Senior Judge Squires and Judge Merck concur.

FOR THE COURT:
JOSEPH A. NEURATER
Clerk of Court

APPENDIX B

IN THE UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	AFFIDAVIT
	)	
APPELLEE,	)	CRIM. APP. DKT.
	)	NO. 9700480
V.	)	
	)	
LOWELL L. MCGEE SFC,	)	
UNITED STATES ARMY	)	
	)	
APPELLANT.	)	
	)	

I, Lowell L. McGee, do swear that the following statements are true and correct to the best of my knowledge:

1. During one of the initial meetings between Captain Rose, my detailed defense counsel, and I, Captain Rose informed me that there were three types of General Court-martial forums: Judge alone; officer panel, and; officer and enlisted panel.

2. During the above stated conversation, Captain Rose told me that we did not have to worry about that (forum) at the time because there would be delays and there were other important things to take care of.

3. During the initial session with the military judge, he informed me of the three types of forum.

4. The next discussion we had regarding forum was when Captain Rose showed me the order by General Ernst that had my name on it and listed the members

that would try me.

5. During the discussion mentioned in para. 4 above, Captain Rose asked me if I knew any of the members on the list or thought that they may know me. I told him that I knew Captain Townsend. He told me something to the effect that that did not matter because General Ernst had excused him.

6. I vaguely recall the conversation between the military judge and Captain Rose on the day of the trial. I did not believe it was important at the time because General Ernst had already issued the order as to who would try me.

7. I was informed of the various types of forum for a General Court-martial by Captain Rose and the military judge.

8. Neither Captain Rose nor the military judge informed me how forum selection would be effectuated.

9. It was by (sic) belief that when General Ernst issued the order, dictating members that would try me, the issue was closed.

10. I never questioned General Ernst's authority to issue the order.

11. I could not, nor can I, comprehend how any actions on my part could invalidate a General's orders.

12. I never requested to be tried by enlisted members.

13. General Ernst issued an order that some of the panel members would be enlisted and that order was followed.

/signed/
Lowell L. McGee
PO Box 76799-4W

310 McPherson Ave.
Ft. Leavenworth, KS 66027-1363

STATE OF KANSAS
COUNTY OF LEAVENWORTH

Sworn to and subscribed before me this 24th of May 1999.

(SEAL)

/signed/
NOTARY
MY COMMISSION EXPIRES
29 MAY 2000

APPENDIX C

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before

TOOMEY, TRANT, and CARTER

Appellate Military Judges

UNITED STATES, Appellee

v.

Private E1 ANTHONY L. NEHRING

United States Army, Appellant

ARMY 9700342

ORDER

WHEREAS, the appellant filed a Brief on Behalf of Appellant on 7 April 1998;

WHEREAS, appellee filed a Brief on Behalf of Appellee on 4 February 1999;

WHEREAS, oral argument was heard before this Court on 24 March 1999;

WHEREAS, appellant has alleged in appellate brief and during oral argument that the record of trial does not indicate that he stated on the record his intent to be tried by a court-martial panel consisting of at least one-third enlisted members;

WHEREAS, the record of trial indicates that only appellant's trial defense counsel stated on the record

that appellant requested a panel including enlisted members;

WHEREAS, appellant asserts that because he did not personally request, on the record, a panel that included enlisted members, in accordance with Article 25, UCMJ, and cases decided thereunder, his court-martial lacked jurisdiction to try him; and

WHEREAS, this Court is unable to resolve these issues, in this case, without an evidentiary hearing; it is by this Court, this date

ORDERED

1. That the record of trial is returned to The Judge Advocate General for transmittal to an appropriate convening authority who shall order an evidentiary hearing before a military judge pursuant to *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).
2. That the hearing be conducted within sixty days from the date of this order;
3. That, at the hearing, the military judge will receive all available evidence in order to make specific findings of fact concerning the allegations noted above.
4. That the military judge permit the presentation of witnesses and evidence, make rulings as appropriate, and enter findings of fact and conclusions of law with respect to the following questions:
    a. Whether appellant's counsel advised appellant of his forum selection choices prior to or during the court-martial;
    b. Whether appellant made a personal deci-

sion regarding forum choice, and the nature of that decision;

c. Whether appellant conveyed such decision to his military defense counsel and/or the military judge;

d. Whether appellant's counsel correctly advised the military judge of appellant's personal decision concerning forum selection.

5. That at the conclusion of the proceedings, the record, with an authenticated verbatim transcript of the hearing, be returned to this Court for further review.

DATE: 26 March 1999

FOR THE COURT:
JOSEPH A. NEURATER
Clerk of Court